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NATIONAL ORIGIN DISCRIMINATION AGAINST AMERICANS OF SOUTHERN AND EASTERN EUROPEAN ANCESTRY: A REVIEW OF THE LEGAL HISTORY AND JUDICIAL INTERPRETATIONS*

RACHEL ROSSONI MUNAFO†

INTRODUCTION

Since the adoption of the thirteenth and fourteenth amendments to the United States Constitution, numerous attempts have been made to safeguard civil rights through legislation. Although legislators often have expressed a desire to protect persons of all ethnic persuasions from the effects of discrimination, it is uncertain to what degree civil rights legislation has benefited Americans of southern and eastern European ancestry. For example, the Civil War Statutes, passed as the Civil Rights Acts of 1866,¹ 1870,² 1871³ and 1875,⁴ were enacted prior to the mass immigration of southern and eastern Europeans to the United States. The breadth of coverage extended by these Acts therefore is unclear. Current legislation, found in the Civil Rights Act of 1964, has failed in application to remove this ambiguity. Notwithstanding this Act's clear prohibition of discrimination based on "race, color, religion, sex, or national origin,"⁵ administrative

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¹ Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

² Civil Rights Act of 1870, ch. 114, 16 Stat. 140.

³ Civil Rights Acts of 1871, ch. 99, 16 Stat. 433 (Feb. 28, 1871); ch. 22, 17 Stat. 13 (Apr. 20, 1871).

⁴ Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

⁵ 42 U.S.C. § 2000e-2(a)(1) (1976).

agencies such as the Equal Employment Opportunity Commission (EEOC) collect data only on specific *racial* groups, namely, Blacks, Orientals, American Indians and Spanish surnamed Americans. White ethnic groups are considered "nonminorities" and therefore are categorized with the "white majority."

The purpose of this paper is to examine the extent to which Americans of southern and eastern European ancestry are protected from discrimination by civil rights legislation. First, national origin discrimination will be viewed in an historical perspective. This review will be followed by a discussion of the history of legislation pertaining to national origin and an analysis of judicial interpretations concerning national origin. The paper will conclude with reflections on the adequacy of present law and suggestions for legislative change.

I. NATIONAL ORIGIN DISCRIMINATION: AN HISTORICAL PERSPECTIVE

A. *Past Discrimination Against Americans of Southern and Eastern European Origin*

During the seventeenth and eighteenth centuries, Anglo-Saxon Protestants dominated the establishment of the legal, political and social institutions of the United States. It was not until the nineteenth century that other groups from diverse cultures began to arrive in large numbers.⁶ Early immigrants, all from northwestern Europe, included Germans, Scandinavians and the Irish. Assimilation into Anglo-American society was relatively easy for these immigrants, because they closely resembled the English in cultural background.⁷ Although adjustment posed few problems for the new Americans, religious differences gave rise to considerable social conflict. Immigrants, such as the Irish, were Catholic, and Protestant-Americans were fiercely anti-Catholic. Extreme Protestant-Americans expressed their hostility toward Catholicism in church burnings, riots and other forms of physical violence, in addition to the more covert forms of prejudice. Historian John Higham has suggested that anti-Catholicism was the most powerful of the antforeign traditions in the United States during the mid-nineteenth century.⁸

Beginning in the 1880's, the complexion and flow of immigration to the United States underwent dramatic change. This "new" immigration was comprised almost entirely of southern and eastern Europeans of the Catholic faith, and most were poor, illiterate peasants. Most abundant among these new immigrants were the southern Italians, who looked strikingly different from the "old" immigrants. While the earlier immigrants

⁶ See generally J. HIGHAM, *STRANGERS IN THE LAND* (2d ed. 1963).

⁷ S. KANSAS, *NEW IMMIGRATION LAW EFFECTIVE JULY 1, 1968*, 316-17 (1967); M. NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS* 72-115 (1971).

⁸ See J. HIGHAM, *supra* note 6, at 5. See generally A. GREELEY, *THAT MOST DISTRESSFUL NATION* (1972).

from northwestern Europe generally were blond and tall, the southern Italian tended to be dark and short. Despite their uncharacteristic physical appearance, the "new" immigrants arrived in such large numbers that by 1914 they outnumbered those who had come from northwestern Europe.⁹

As a result of the mass immigration of poor, foreign-speaking persons, the urban slums of the northeastern United States became congested. A national social problem developed, and Anglo-American hostility toward immigrants of southern and eastern Europe intensified.¹⁰ In 1891, for example, eleven Sicilian immigrants were lynched in New Orleans.¹¹ Prominent Anglo-Americans¹² adopted racist theories holding that the Mediterranean race was inferior to the Nordic and Aryan races and that southeastern Europeans eventually would "mongrelize" the Anglo-American culture. Indeed, it was believed that it would be impossible to Americanize these Mediterranean people.¹³

The Dillingham Commission, which investigated the problems caused by immigration, concluded that Italian immigrants had innate criminal propensities and that Polish immigrants were predisposed toward instability and personality disorder. Responding to these racist theories, Congress passed the Immigration Act of 1924,¹⁴ which created nationality quotas. It seems that the purpose of these quotas was to discourage immigration from southeastern Europe and to encourage it from northwestern Europe.¹⁵ Congress revised the immigration laws in 1952 but, significantly, preserved the national origins quota system. This revision, known as the McCarran-Walter Act,¹⁶ was vetoed by President Truman on the ground that it discriminated against immigrants from southern and eastern Europe. In vetoing this Act, the President stated:

⁹ E. ABBOTT, IMMIGRATION: SELECT DOCUMENTS AND CASE RECORDS 233 (1924).

¹⁰ See S. LA GUMINA, W.O.P.! A DOCUMENTARY HISTORY OF ANTI-ITALIAN DISCRIMINATION IN THE UNITED STATES (1973).

¹¹ R. GAMBINO, VENDETTA (1977).

¹² New England intellectuals such as Henry Cabot Lodge, Henry Adams and Barrett Wendell were among those Anglo-Americans who condemned the new immigration based on racist theories. J. HIGHAM, *supra* note 6, at 139-41.

¹³ *Id.* at 155-57.

¹⁴ Immigration Act of May 26, 1924, ch. 190, 43 Stat. 153 (repealed June 27, 1952).

¹⁵ The Immigration Act of 1924 provided for the initial limit on immigration of persons of any nationality to be "2 per centum of the number of foreign-born individuals of such nationality resident in the continental United States as determined by the United States census of 1890" Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153. Beginning July 1, 1927, immigration of any nationality was to be limited to "a number . . . bear[ing] the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin . . . [bore] to the number of inhabitants in continental United States in 1920" *Id.* § 11(b). Since mass immigration of southern and eastern Europeans did not commence until the 1880's, *see* notes 8 & 9 and accompanying text *supra*, it appears clear that the 1924 Act was calculated to stem such immigration.

¹⁶ Immigration and Nationality Act, ch. 477, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1503 (1976)).

The idea behind this discriminatory policy was, to put it boldly, that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names . . . Such a concept is utterly unworthy of our traditions and our ideals.¹⁷

Despite Truman's objections to the Act, Congress overrode his veto.¹⁸

In 1957, five years after the passage of the McCarran-Walter Act, the then Massachusetts Senator, John F. Kennedy, proposed the abolishment of the national origins quota law. Failing in this effort, Kennedy renewed his proposal in 1963, this time as President of the United States. Opposition to this recommendation persisted, however, and was especially evident among Senators representing southern states.¹⁹ The late President's dream became a reality on October 3, 1965, when Congress abolished the national origins quota system as a memorial to the slain President.²⁰

B. Present Discrimination Against Americans of Southern and Eastern European Origin

Many sociologists contend that Anglo-American discrimination against white ethnics still exists and in part accounts for the "ethnic revival" of the 1960's and 70's. Andrew M. Greeley, a sociologist who is particularly outspoken on the issue of ethnicity, maintains that

[the] stereotype [of the white ethnics] and the racism that produced it have never been critically examined by the nation's cultural and intellectual elite . . . [T]he Polish or Irish Archie Bunker—so dearly loved by national media—is a descendant of the racially inferior immigrant described by the Dillingham Commission.²¹

Notwithstanding the belief among academics that white ethnics continue to suffer from discrimination, proof of discrimination is made very difficult by the lack of data on ethnicity. The United States Census, for example, counts Blacks, American Indians, Chinese, Japanese and other races. It does not record ethnic origin, however, except for residents born abroad and their children. Since ethnicity is recorded only for two generations, third and subsequent generation Americans of southern and eastern European ancestry are classified solely according to race. As a result, the federal bureaucracy lumps the grandchildren and great-grandchildren of the Italian, Greek and Polish immigrants with Anglo-Americans into the so-called "white majority," which removes them from "minority" or "ethnic" status.²² The assumption behind such a classification is that

¹⁷ J. KENNEDY, *A NATION OF IMMIGRANTS* 78 (1964).

¹⁸ See 66 Stat. 281-82 (1952).

¹⁹ See note 54 *infra*.

²⁰ Act of Oct. 3, 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911 (codified at 8 U.S.C. § 1152 (1976)).

²¹ Greeley, *After Ellis Island*, HARPER's, Nov., 1978 at 30.

²² This will change with the 1980 Census, which will include a question on ethnic identity. The "ethnic revival" appears to have had an impact on some governmental agencies, such as the Census Bureau. But, as this paper will discuss, other agencies such as EEOC continue

white ethnic groups lose their ancestral culture and become assimilated "Americans" by the third generation. It is submitted that this notion of assimilation has resulted from a misconception of the process by which immigrants are "assimilated" into American life. Indeed, several theories of this process have evolved and may help account for the failure of governmental action to protect the civil rights of the white ethnic groups and end national origin discrimination.

In his book, *Assimilation in American Life*, sociologist Milton Gordon discusses three theories of assimilation: Anglo-conformity, the melting pot and cultural pluralism.²³ Anglo-conformity refers to the "Americanization" process, which demands complete renunciation of the immigrant's ancestral culture in favor of the behavior and values of the Anglo-Saxon core group. According to Gordon, this theory, which disfavors cultural diversity, has been the prevalent ideology of assimilation in American history.²⁴ Anglo-conformity involves two kinds of assimilation: acculturation and structural assimilation. Acculturation is the process by which ethnic groups adopt the lifestyle of the new society, including its language and dress. By comparison, structural assimilation involves a more complicated process, by which ethnic groups eventually relate to members of other ethnic groups without regard to ethnic differences, as, for example, in friendship and family formation. Gordon maintains that ethnic groups such as Americans of southern and eastern European ancestry for the most part have achieved acculturation but not structural assimilation, since distinctive ethnic identities persist well beyond the second generation.

The melting pot theory posits a blending of the cultures of the Anglo-Saxons with those of other immigrant groups into a "new" American culture. As Gordon and other sociologists have observed, however, Anglo-Americans expected that the cultures of the immigrants would melt completely into the Anglo-American culture, a view that is indistinguishable from that of Anglo conformity.

A third theory of assimilation, cultural pluralism, stresses the importance of diversity in society and the value of maintaining many cultures as a means of enriching a society. Cultural pluralism envisions a society in which ethnic groups retain a part of their cultural identities but also are integrated into society. Thus, an Italian American, for example, has a dual identity. As an American, he or she is integrated into the social, economic and political institutions of American society, but as an Italian, he or she retains many Italian cultural values and attitudes toward such institutions as family, religion, work, child-rearing and recreation. Cultural pluralism therefore removes the stigma which Anglo conformity attaches to being an "ethnic."

to define "ethnic" and "minority" in such a way as to exclude Americans of southern and eastern European ancestry.

²³ See M. GORDON, *ASSIMILATION IN AMERICAN LIFE* 85 (1964).

²⁴ *Id.* at 89.

In recent years, the concept of cultural pluralism has assumed a significant role in the shaping of public policy but only as it relates to certain racial minorities. It now is accepted that Blacks, Hispanics, Orientals and American Indians cannot assimilate totally into the Anglo-American mold, because racial discrimination has obstructed total integration. With the exception of the Japanese,²⁵ total assimilation of different races has failed. In the case of the white ethnic minorities, however, it is assumed that assimilation has been achieved and therefore that members of these groups now fall within the "white majority." Gordon and other sociologists have suggested that this is a misconception.²⁶ Americans of southern and eastern European heritage have failed to assimilate the American culture totally not only because their cultures are so dissimilar from the Anglo-Protestant culture, but also because national origin and religious discrimination have obstructed total integration. Like the racial minorities, the white ethnic minorities have not "melted" into Anglo-America as expected. Nevertheless, public policy continues to ignore this reality, and ethnicity is now officially synonymous with skin color. A person is an "ethnic" only if his skin is not white. Thus, Greeks, Italians, Poles and Slavs are not considered ethnics and are classified as "nonminorities" by governmental agencies such as the Census Bureau, the Department of Health, Education and Welfare, the Department of Labor, and the EEOC.²⁷

The government's definition of "minority" has created serious problems for the white ethnic groups. Since white ethnics are classified as nonminorities, no agency compiles official data concerning them. From a

²⁵ Japanese Americans have a median family income that is \$3,000 higher than that of the average American family. They are more likely to hold professional occupations than other Americans, and their level of education is higher than that of any other white or non-white group. This is so despite systematic discrimination by American society which included the relocation of all Japanese Americans into detention camps during World War II. Montero, *For Japanese-Americans, Erosion*, N.Y. Times, Dec. 4, 1978, § 1, at 21, col. 2.

²⁶ See generally N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* (2d ed. 1970); A. GREELEY, *ETHNICITY IN THE UNITED STATES* (1974); A. GREELEY, *WHY CAN'T THEY BE LIKE US?* (1971); W. NEWMAN, *AMERICAN PLURALISM* (1973); M. NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS* (1971).

²⁷ A review of the regulations defining the approach to minorities taken by various agencies in the federal government reveals that within the government, the term "minority" is primarily a racial classification. For example, the General Services Administration, in its government-wide procurement regulations, defines a minority business enterprise as one in which "minority group members" own at least a 50% interest. For the purpose of making this determination, the term "minority group members" is defined as including "Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American-Eskimos, and American-Aleuts." 41 C.F.R. § 1-1.1303 (1978). These guidelines have been implemented by specific government agencies. See 41 C.F.R. § 24-1.715-1 (1978) (H.U.D.); 32 C.F.R. § 7-104.36 (1976) (National Defense). Similar definitions are used by agencies to determine which groups are minorities in awarding federal contracts, see 41 C.F.R. § 60-4.3(a) (1978), making grants to institutions engaged in biomedical research, see 42 C.F.R. § 52c.2(d) (1978), and charting compliance with the Equal Employment Opportunity Act of 1972 (Pub. L. No. 92-261, 86 Stat. 103), see U.S. Civil Service Commission, *Equal Employment Opportunity Statistics* vi (1977).

statistical standpoint, therefore, white ethnics are virtually invisible. As a result of this classification scheme, legislators and bureaucrats who rely on social statistics in shaping public policy inadvertently ignore the white ethnic groups. Additionally, it is now all but impossible to prove the existence of either ethnic differences other than those based on skin color or discrimination against white ethnics. White ethnics who are victims of discrimination, therefore, must try to prove this without the benefit of group statistics. This burden is difficult, if not impossible, to overcome.

Notwithstanding the lack of government statistics, several private studies have concluded that discrimination against Americans of southern and eastern European ancestry persists. A study of the 106 largest business entities in Chicago, for example, revealed that fewer than three percent of their directors and fewer than four percent of their officers were either Italian, Polish, Latin or Black. Moreover, eighty-four of the corporations had no director of Italian extraction, and seventy-five of the companies had no Italian officers.²⁸ A 1975 study conducted in Detroit disclosed similar statistics.²⁹ Additionally, studies of large law firms in Detroit and New York City suggest that these firms observe discriminatory hiring and promotion practices. The studies indicate that those of Mediterranean or Slavic ancestry commonly engage in solo practice, and higher paying positions with firms generally are held by persons of Northeastern European ancestry.³⁰ It also appears that Protestant lawyers have had a far greater likelihood of ending their careers in large firms than have Catholic or Jewish lawyers.³¹

Interestingly, governmental agencies such as the EEOC are aware of the ongoing discrimination against the white ethnic groups. According to the EEOC's guidelines, Americans of southern and eastern European ancestry "continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin."³² It is therefore difficult to understand why the EEOC does not collect data on these groups or promote affirmative action on their behalf. Despite this inconsistency, a review of EEOC policy statements and guidelines reveals no express explanation for its selective enforcement of Title VII of the Civil Rights Act of 1964.

²⁸ See Institute of Urban Life for the National Center for Ethnic Affairs, *Minority Report: The Representation of Poles, Italians, Latins, and Blacks in the Executive Suites of Chicago's Largest Corporations* (1974).

²⁹ See MICHIGAN ETHNIC HERITAGE STUDY, *ECONOMIC ELITE STUDY* (1975).

³⁰ Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law*, 16 J. LEGAL EDUC. 127, 136-38 (1963).

³¹ See J. CARLIN, *LAWYERS' ETHICS* 28 (1966).

³² Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor, *Guidelines on Discrimination Because of Religion or National Origin*, 41 C.F.R. § 60-50.1b (1978).

II. LEGISLATIVE HISTORY OF THE CIVIL RIGHTS STATUTES

A. *The Reconstruction Statutes*

A primary goal of the Civil Rights legislation enacted after the Civil War³³ was to eliminate the vestiges of slavery and protect blacks from racial discrimination. Interestingly, however, a review of the legislative history of the Civil Rights Acts of 1866, 1870, 1871 and 1875 reveals that their supporters intended that the Acts protect the civil liberties of *all* persons, without regard to national origin or race.³⁴ The desire to provide equal protection under the law and equality of economic opportunity to all persons was expressed by the proponents of legislation and formed the basis of objection by opponents.³⁵

The sweeping reforms sought by the proponents of the 1866 Act are illustrated by the remarks of Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, during the congressional debate on the Bill:

Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment on his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.³⁶

Similar sentiments were expressed by other legislators during the de-

³³ The thirteenth amendment, adopted in 1865, was implemented by the Civil Rights Act of 1866, ch. 31; 14 Stat. 27 (codified at 42 U.S.C. §§ 1981, 1982 (1976)). The fourteenth and fifteenth amendments were adopted in 1868 and 1870, respectively, and were followed by passage of the Civil Rights Acts of 1870, ch. 114, 16 Stat. 140, Feb. 28, 1871; ch. 99, 16 Stat. 433, Apr. 20, 1871; ch. 22, 17 Stat. 13; and 1875, ch. 114, §§ 3-5, 18 Stat. 335. The Civil Rights Act of Apr. 20, 1871, expressly enforcing the fourteenth amendment, is now codified at 42 U.S.C. §§ 1983, 1985(c) (1976).

³⁴ See, e.g., Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 1), 12 Hous. L. Rev. 1, 21 (1974). Professor Buchanan's research on the legal history of the thirteenth amendment is contained in a series of articles published in volume 12 of the Houston Law Review.

³⁵ See *id.* at 21-22.

³⁶ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Senator Trumbull is viewed by some as a controversial figure in the Reconstruction Congress. One reason for this is that he seems to have reversed himself on the crucial civil rights issue of the day. He was a leading architect of the thirteenth amendment and the Civil Rights Act of 1866, yet he opposed the adoption of the fourteenth amendment in 1868 and the passage of the Civil Rights Acts of 1871 and 1875. Professor Buchanan explains that Trumbull's opposition to the Civil Rights legislation of the 1870's was grounded in the belief that it was superfluous. Trumbull disagreed with those in the Senate and the House who believed that the Civil Rights Act of 1866 was an unconstitutional exercise of Congressional authority and, therefore, opposed the attempt to legitimize it by adoption of the fourteenth amendment and passage of the Civil Rights Act of 1871. Although the amendment and Act remained dormant for many years following the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873), and the *Civil Rights Cases*, 109 U.S. 3 (1883), both provisions have been revitalized by recent decisions of the Supreme Court. See Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 2), 12 Hous. L. Rev. 331, 339 (1975).

bates.³⁷ While it is clear, therefore, that passage of the Civil Rights Act of 1866 was intended to secure protection under the law for persons of every race, there is strong evidence to suggest that it also was directed at eliminating discrimination based on religion, sex and national origin.³⁸

Although national origin discrimination was not expressly mentioned in Congressional debates on the Reconstruction statutes, this is reasonable because the debates preceded the mass migration of southern and eastern Europeans by several years.³⁹ Indeed, recognition that discrimination based on national origin constitutes a social problem is of recent vintage, and many in the intellectual and cultural elite still do not so regard it.⁴⁰ Only within the past fifteen years has any systematic attempt been made in the United States to examine either the concept of cultural pluralism or the related problem of discrimination based on national origin.⁴¹

In an historical study of the thirteenth amendment,⁴² Professor G. Sidney Buchanan contends that since the Reconstruction statutes were intended to protect all persons from arbitrary class prejudice, they should be construed broadly to proscribe various forms of class prejudice, including national origin discrimination.⁴³ Not all scholars have adopted Professor Buchanan's interpretation, some expressing the view that the legislative intent of the thirteenth amendment was limited to the abolishment of slavery.⁴⁴ In support of this restrictive interpretation, it is observed that the fourteenth amendment⁴⁵ extends civil rights to all persons, including

³⁷ During the ten year period between 1865 and 1875, several legislators came out in favor of legislation that would guarantee civil rights to *all* persons. For example, Iowa Representative Wilson, Chairman of the Judiciary Committee, argued that the thirteenth amendment would provide "a remedy which [would] make the future safe for the rights of each and every citizen." CONG. GLOBE, 38th Cong., 1st Sess. 1203 (1864). Similarly, Ohio Representative Bingham, architect of the fourteenth amendment, hoped that the amendment and the legislation following its adoption would extend the equal protection of the laws to all citizens. B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS (pt. 1) 191 (1970). See also Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 2), 12 Hous. L. Rev. 331, 341-42 (1975).

³⁸ Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 8), 12 Hous. L. Rev. 1070, 1075-77 (1975).

³⁹ As earlier noted, southern and eastern Europeans began to arrive in the United States in large numbers during the 1880's. See note 9 and accompanying text *supra*.

⁴⁰ See note 21 *supra*.

⁴¹ See note 26 *supra*.

⁴² The thirteenth amendment provides, in pertinent part:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIII, § 1.

⁴³ See generally Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 8), 12 Hous. L. Rev. 1070 (1975).

⁴⁴ B. SCHWARTZ, *supra* note 37, at 23-24.

⁴⁵ Section one of the fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

freed slaves, whereas the thirteenth amendment merely abolishes slavery.⁴⁶ If the thirteenth amendment had been intended to protect the civil rights of all persons, it is argued, there would have been no need for the fourteenth amendment. Even those who subscribe to this restrictive interpretation concede, however, that both the thirteenth amendment and the Civil Rights Act of 1866 were intended by their proponents to be broad enough in scope to eliminate all "badges of servitude" and protect every citizen's civil rights.⁴⁷ It appears that passage of the fourteenth amendment resulted from a fear that the Civil Rights Act of 1866, vetoed by President Andrew Johnson, was unconstitutional. Legislators feared that the thirteenth amendment did not authorize them to prohibit acts of discrimination such as those proscribed by the statute.⁴⁸ Regardless of the influence that legislative caution may have had on the adoption of the fourteenth amendment, however, it is submitted that the intent underlying the thirteenth amendment and the Civil Rights Act of 1866 is sufficiently far-reaching to prohibit both private and governmental acts of arbitrary class discrimination, including discrimination based on religion, sex and national origin.

B. *The Modern Civil Rights Statutes*

Following the Supreme Court's decision in *Brown v. Board of Education*,⁴⁹ rendered in 1954, the problem of racial discrimination became an important public issue. Congress made weak attempts to cure the problem in 1957⁵⁰ and 1960,⁵¹ but it was not until 1964 that a strong civil rights act was passed expressly prohibiting discrimination based on religion, national origin, race and color.⁵² Constitutional authority for passage of the Civil Rights Act of 1964 was derived from the commerce clause and the fourteenth and fifteenth amendments. As Professor Buchanan observes, there were several reasons for Congress' refusal to place express reliance on the thirteenth amendment in adopting either this Act or the Civil

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

⁴⁶ B. SCHWARTZ, *supra* note 37, at 181.

⁴⁷ *Id.* at 100.

⁴⁸ Many members of the Senate expressed doubts as to the constitutionality of the Civil Rights Act of 1866, including Senators Saulsbury, *see* CONG. GLOBE, 39th Cong., 1st Sess. 476, 478 (1866), Cowan, *see id.* at 499, 1784, and Johnson, *see id.* at 1775-79. In the House, the Act was challenged on constitutional grounds by Representatives Rogers, *see id.* at 1120, and Bingham, *see id.* at 1291.

⁴⁹ 347 U.S. 483 (1954).

⁵⁰ *See* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

⁵¹ *See* Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.

⁵² *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 101-1101, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1976)).

Rights Act of 1968. First, Congress was reluctant to rely on a "badge of slavery" theory based on a liberal construction of the thirteenth amendment that had not been tested in the courts. Moreover, the thirteenth amendment was considered "dead," since slavery long since had been abolished. Finally, the modern civil rights statutes prohibited forms of arbitrary class discrimination other than merely racial discrimination. Since the thirteenth amendment was viewed strictly as a prohibition of slavery, Congress rejected the idea that it could provide a constitutional basis for other nonracial forms of class discrimination.⁵³

A review of the Congressional debates on the modern Civil Rights Acts reveals that Congress' main concern in enacting this legislation was to protect blacks from racial discrimination. Although it is difficult to find references to national origin in the Congressional debates, it is clear that some members of Congress, such as Senator Javits, envisioned legislation of broad scope, intending the statute to prohibit discrimination based on national origin, religion and sex, as well as race. For example, a discussion of the definition of national origin took place in 1959 between Senators Javits and Ervin:

Senator Ervin:

What does the term 'national origin' mean?

Senator Javits:

Well, the term national origin means people whose ancestry is foreign to that of the United States, and it remains distinguishable in their customs and in the fact that they haven't been here more than one generation.⁵⁴

Unfortunately, even Senator Javits, who supported the Act, apparently would have limited the term "national origin" to the immigrant generation itself. Congressional concern for national origin again emerged in debates preceding passage of Title VII of the Civil Rights Act of 1964⁵⁵ and amendments to the same in 1972. The 1972 debates demonstrated a growing awareness of the need to protect white ethnic groups from national origin discrimination. The comments of Senators Williams and Javits during the debates clearly indicated this:

Senator Williams:

Irish, Italians, Jewish people, black people, and women — these are the people to whom we are trying to give an equal opportunity

Senator Javits:

⁵³ Although much of the modern civil rights legislation has sprung from the fourteenth amendment, the thirteenth amendment achieved a new prominence in the area with the Supreme Court decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See generally Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 6), 12 Hous. L. Rev. 844 (1975).

⁵⁴ *Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary*, U.S. Senate, 86th Cong., 1st Sess. 27 (1959).

⁵⁵ See 110 CONG. REC. 2549 (1964).

One of the things that those discriminated against have resented the most is that they are relegated to the . . . blue-collar jobs . . . ; and that though they built America, . . . they cannot ascend the higher rungs in professional and other life.⁵⁶

In a 1972 amendment to the Higher Education Act of 1965, entitled the Ethnic Heritage Studies Program,⁵⁷ the House of Representatives issued a statement of policy that clearly showed a new attitude toward ethnicity and cultural pluralism in the United States:

The Committee believes . . . [that] we ought to recognize . . . what has always existed in our country: an amazing mosaic of diverse groups, each with its own characteristics but each lending strength to the unified whole.⁵⁸

In summary, Congressional debates on the modern civil rights acts reveal that although Congress' primary goal in passing the acts was to protect blacks from racial discrimination, some legislators also desired to proscribe discrimination based on religion, national origin and sex. Moreover, it appears that the term national origin was intended to apply to all national groups, including Americans of southern and eastern European ancestry. It is submitted that the civil rights legislation currently in force is written in language that is broad enough to bring about the reforms sought by its most ambitious proponents.

III. JUDICIAL INTERPRETATIONS CONCERNING NATIONAL ORIGIN DISCRIMINATION

A. *Cases Construing the Reconstruction Statutes*

To date, no court has construed the modern versions of the Reconstruction statutes to proscribe discrimination based on national origin in a case involving an American of southern or eastern European ancestry. A

⁵⁶ See 118 CONG. REC. 3801-02 (1972).

⁵⁷ See Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235,504 (codified at 20 U.S.C. §§ 900 to 900a-5 (1976)).

⁵⁸ H.R. REP. No. 554, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2530, 2531. In reporting the Education Amendments of 1972, the House also stated as follows:

The Committee [on Education and Labor] has come to the conclusion that the curriculum in our elementary and secondary schools all too frequently does not provide [a] source of positive identity; rather it serves to alienate and confuse far too many of our youth. The basic reason for this is that many schools have fostered a shame or at least an uneasiness among their students about their ethnic heritages. They have done this in reliance on the "melting pot" theory, the idea that differences between the many diverse groups in the United States would eventually be melted down to conform with the characteristics of the predominant group.

The only problem with this theory is that it didn't happen that way in the past and it isn't happening that way now. But we are paying now for its past and present influence in American life by a feeling of alienation from society felt by many citizens and by a mood of intolerance of any diversity in our society.

Id. at 2530-31.

review of the case law relevant to national origin discrimination suggests, however, that the possibility of successfully basing claims on these statutes may be increasing.

In three noteworthy cases of modern vintage, the United States Supreme Court held that the Reconstruction statutes proscribe all racial discrimination, both private and public. In these cases, the Court construed the statutes to be valid exercises of Congressional power under the thirteenth amendment.⁵⁹ In so doing, the Court revitalized the thirteenth amendment and, in the words of Professor Buchanan, restored it "to its intended position in the regulation of arbitrary class prejudice."⁶⁰

In the landmark case of *Jones v. Alfred H. Mayer Co.*,⁶¹ a Black man and his wife were denied the right to purchase a home in a suburb of St. Louis, Missouri, by a private real estate company. Alleging that they had been refused the home solely because of their race, the couple brought suit under section 1982 of title 42 of the United States Code, which guarantees all persons an equal right to purchase property.⁶² The Court held that section 1982 bars all racial discrimination, private and public, in the sale or rental of property.⁶³ It should be noted, however, that the Court expressly limited its holding to racial discrimination.⁶⁴

The Court again considered the degree to which the government may proscribe private discrimination in *Griffin v. Breckenridge*,⁶⁵ decided in 1971. *Griffin* arose out of an incident in which a group of blacks, who were traveling by automobile on a Mississippi highway, were stopped by two white men, forced to get out of their car and beaten with clubs. The Court held that section 1985(3), which permits those deprived of civil rights to bring an action to recover damages,⁶⁶ reaches private conspiracies and that,

⁵⁹ See *Runyon v. McCrary*, 427 U.S. 160 (1976); *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). For a pre-*Jones* interpretation of the thirteenth amendment, see the Civil Rights Cases, 109 U.S. 3 (1883).

⁶⁰ Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 1), 12 Hous. L. Rev. 1, 2 (1975).

⁶¹ 392 U.S. 409 (1968).

⁶² 42 U.S.C. § 1982 (1976) provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

⁶³ 392 U.S. at 437-39.

⁶⁴ *Id.* at 439.

⁶⁵ 403 U.S. 88 (1971).

⁶⁶ 42 U.S.C. § 1985(c) (1976) (formerly § 1985(3)) provides, in pertinent part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby

so construed, it is a valid exercise of Congressional power under the thirteenth amendment.⁶⁷ Interestingly, the Court in *Griffin* did not limit section 1985(3) to racial discrimination. Instead, it ruled that section 1985(3) provides relief whenever it is shown that there was "some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action."⁶⁸ The Court added in a footnote that "[w]e need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us."⁶⁹ This expansive language has been construed by a number of lower courts to mean that section 1985(3) prohibits discrimination based on nonracial classifications such as sex, religion and national origin.⁷⁰ Based on *Griffin*, therefore, it appears that section 1985(3) may be construed to protect Americans of southern and eastern European ancestry from national origin discrimination.

Five years after its decision in *Griffin*, the Supreme Court was presented with another claim of private discrimination in *Runyan v. McCrary*.⁷¹ The lawsuit in *Runyan* was brought by two Black families whose children were denied admission into two private schools in Virginia solely on the basis of their race. Construing section 1981, which guarantees equal protection of the laws to "[a]ll persons within the jurisdiction of the United States,"⁷² the Court held that this section bans private and public racial discrimination in the making and enforcing of contracts.⁷³

Case law interpreting section 1981 is in a state of flux, although recent decisions appear to have broadened the statute's scope. On the same day that the *Runyan* case was decided, for example, the Court expanded section 1981 to include discrimination against white persons in *McDonald v. Sante Fe Trail Transportation Co.*,⁷⁴ stating:

another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

⁶⁷ 403 U.S. at 101-02.

⁶⁸ *Id.* at 102 (1971).

⁶⁹ *Id.* at 103 n.9.

⁷⁰ See, e.g., *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1243-44 (3d Cir. 1978), *vacated on other grounds*, 47 U.S.L.W. 4681 (June 11, 1979); *Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1192 n.1 (7th Cir. 1976); *Arnold v. Tiffany*, 359 F. Supp. 1034, 1036 (C.D. Cal.), *aff'd*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

⁷¹ 427 U.S. 160 (1976).

⁷² 42 U.S.C. § 1981 (1976) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by the white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

⁷³ 427 U.S. at 170-71.

⁷⁴ 427 U.S. 273 (1976).

Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.⁷⁵

Section 1981 has been extended by some lower courts to apply to nonracial classifications such as alienage⁷⁶ and national origin as it relates to Hispanic Americans,⁷⁷ although there is a split in authority over the application of the sections to Hispanics.⁷⁸ Cases concerning the rights of Hispanic Americans under section 1981 reveal how problematical the concept of cultural pluralism has proven for the courts. Courts that have extended the protection of the section to Spanish surnamed persons have found national origin to be indistinguishable from racial discrimination or have equated it with alienage. In *Miranda v. Local 208, Amalgamated Clothing Workers*, for example, the District Court for the district of New Jersey stated:

While section 1981 may have had its historical roots in the post-Civil War attempt to eradicate all incidence of black slavery, this section, like all Civil Rights legislation, has been broadly construed to effectuate its remedial purpose of providing equal opportunity in all institutions for all protected minorities

Section 1981 has become a major tool in the struggle for equal employment opportunities for the nation's minorities, including Blacks, Indians, aliens, Mexican-Americans, and Puerto Ricans.⁷⁹

Although the *Miranda* court did not expressly include Americans of southern and eastern European ancestry in its discussion of "protected minorities," there appears to be no reason for these groups to be excluded from protection under this interpretation of section 1981.

⁷⁵ *Id.* at 295-96.

⁷⁶ *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529, 536 (S.D. Tex. 1972).

⁷⁷ See *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135 (N.D. Ill. 1977); *Maldonado v. Broadcast Plaza, Inc.*, 10 FEP Cas. 839 (D. Conn. 1974); *Miranda v. Local 208, Amalgamated Clothing Workers*, 10 FEP Cas. 557 (D.N.J. 1974); *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142 (S.D. Tex. 1973), *aff'd*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977).

⁷⁸ See *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978); *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125 (E.D. Pa. 1978); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D. Pa. 1975).

⁷⁹ 10 FEP Cas. 557, 558 (D.N.J. 1974) (citation omitted). While no case has been found in which a court has construed section 1981 to protect Americans of southern and eastern European ancestry, see notes 80-82 and accompanying text *infra*, the *Miranda* court's broad interpretation of the section is not entirely unique. Other courts have held that section 1981 protects aliens, including Mexican Americans, see *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142, 1147 (S.D. Tex. 1973), *aff'd*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977), and Puerto Ricans, see *Maldonado v. Broadcast Plaza, Inc.*, 10 FEP Cas. 839, 840 (D. Conn. 1974).

Notwithstanding the liberal construction given section 1981 in cases such as *Miranda*, no case has been found in which the section was held applicable to Americans of southern and eastern European ancestry. The difficulty experienced by white ethnics claiming to have suffered from discrimination is illustrated by the case of *Budinsky v. Corning Glass Works*.⁸⁰ In 1977, John Budinsky, a former employee of Corning Glass Works, brought suit against Corning, claiming that Corning had demoted and ultimately discharged him solely due to his Slavic origin. Offering both historical and sociological data in his brief, Budinsky contended that to exclude ethnic groups such as Slavs from the scope of section 1981 would be to ignore the social changes that have occurred in the United States since the statute was enacted. In making this argument, Budinsky urged the court to define the word "race" in its sociological rather than biological sense. "Race" in the sociological sense considers "the concept that people differ from each other not primarily because of their physical characteristics, but because of cultural and national differences."⁸¹ Labelling this argument "rather sophisticated," the court rejected it as too scientific and not pragmatic. The court refused to bring persons of Slavic, Italian or Jewish origin within the ambit of section 1981 protection, although it would have extended protection to an Indian litigant. In making this distinction, the court stated that the latter group "have been traditional victims of group discrimination, and, however inaccurately or stupidly, are frequently and even commonly subject to a 'racial' identification as 'non-whites.'"⁸²

Other courts appear to be struggling with the problem of defining "race" and "national origin" for section 1981 purposes. In one recent case, a federal district court suggested that a "pragmatic approach" would be for courts to acknowledge that ethnic minorities, "such as Italians and Jews at the turn of the century or Hispanics today, may 'drift' within and later without Section 1981 protection, depending on the circumstances of the times, and the shifts in recognition of ethnic and racial equality by the majority."⁸³ The court in this case noted, however, that there are logical problems involved in this approach.⁸⁴

⁸⁰ 14 FEP Cas. 504 (W.D. Pa. 1977).

⁸¹ Brief for Plaintiff at 5, *Budinsky v. Corning Glass Works*, 14 FEP Cas. 504 (W.D. Pa. 1977).

⁸² 14 FEP Cas. at 506. Relying upon *Budinsky* for precedent, the same court subsequently dismissed another complaint against the same employer by another Slavic-American. See *Sokolski v. Corning Glass Works*, 14 FEP Cas. 936, 937 (W.D. Pa. 1977). See also *Kurylas v. United States Dep't of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974) (§ 1981 inapplicable to Americans of Polish ancestry).

⁸³ *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 139 (N.D. Ill. 1977).

⁸⁴ *Id.* at 139. In another case, *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976), the court discussed the problems encountered in trying to determine whether discrimination against a national origin group constitutes racial discrimination and offered suggestions for approaching these problems:

Equal Protection Clause cases analyzing the classness of Hispanic American groups have not focused on racial characteristics because classness could be proved on the

While persons claiming to have been injured by national origin discrimination thus far have not fared well in the courts, *Griffin v. Breckenridge* appears to have opened the door to such claims under section 1985(3). Professor Buchanan suggests that the next step should be for Congress to provide statutory protection for the nonracial classes using the "badge of slavery" concept of the thirteenth amendment.⁸⁵ Unless and until congressional action is forthcoming, however, white ethnics who seek remedies under section 1981 based on national origin discrimination probably will not be successful in their claims.

B. Cases Construing the Modern Civil Rights Statutes

The Civil Rights Act of 1964 specifically prohibits discrimination based on nonracial classifications such as national origin and religion.⁸⁶ Clearly, then, the problem encountered in section 1981 cases of defining "racial" broadly enough to include "national origin" does not exist in cases construing modern civil rights legislation. Although national origin discrimination has been outlawed by the 1964 Act, however, the Act gives no definition of the term "national origin." Both the United States Supreme Court and the EEOC have offered definitions. In *Espinoza v. Farah Manufacturing, Inc.*, the Court stated that "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."⁸⁷ Under EEOC policy, national origin "has come to mean the country of one's ancestry—rather than race or color."⁸⁸ Thus, national origin includes members of all na-

basis of cultural and ethnic commonalities, and of the discriminatory social practices directed at the class by majority groups. In *Cisneros v. Corpus Christi-Independent School District*, 324 F.Supp. 599, 606 n.30 (S.D. Tex. 1970), the court quoted from the testimony of an expert witness who said Mexican Americans were a minority from the social science, legal, cultural, and racial points of view. In *Van Hoomissen v. Xerox Corporation*, 368 F.Supp. 829, 840 n.7 (N.D. Cal. 1973), the court explicitly avoided deciding the question whether Mexican Americans should be considered non-white for the purposes of § 1981. We are not aware of an authoritative and judicially manageable method for distinguishing between national origin discrimination and racial discrimination when both may be present at the same time. On the one hand, courts might attempt on a case by case basis to separate out the elements of racial and national origin discrimination. Another approach would be to consider sociological and historical evidence relevant to the experience of a particular national origin group in the community in which discrimination is alleged, together with anthropological evidence about the racial characteristics of the national origin group, and determine whether it should be rebuttably presumed that discrimination against that group is infected with racial discrimination.

420 F.Supp. at 666 n.2.

⁸⁵ See Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (ch. 8), 12 Hous. L. Rev. 1069, 1070-85 (1975).

⁸⁶ See, e.g., 42 U.S.C. § 2000e-2 (1976) (prohibition of employment discrimination).

⁸⁷ 414 U.S. 86, 88 (1973).

⁸⁸ [1978] 8 LAB. REL. REP. (BNA) 421:751.

tional groups, including Americans of southern and eastern European ancestry.

Most claims of national origin discrimination filed by Americans of southern and eastern European heritage under the 1964 Act have alleged violations of Title VII.⁸⁹ It appears that all of these claims have met with failure. While some have been dismissed on procedural grounds,⁹⁰ those that have been decided on their merits also have failed.⁹¹ In *Cariddi v. Kansas City Chiefs Football Club, Inc.*,⁹² for example, the plaintiff, an Italian-American, claimed that ethnic slurs such as the words "dago" and "Mafia" constituted Title VII violations. The court rejected this claim, finding that the slurs were "part of casual conversation and did not rise to the level necessary to constitute a violation of Title VII."⁹³ In determining that there had been no violation, the court noted that other Italian Americans were employed by the employer and that the plaintiff's wife and daughter also were employees.⁹⁴

At the time this paper is published, an important Title VII case involving an Italian American is still pending. John Lucido, an attorney formerly associated with a large law firm in New York City, has commenced an action against the firm, claiming that he was discriminated against with respect to work assignments, training, rotation, outside work opportunities and advancement because he is Italian and Catholic. Lucido prevailed in a procedural challenge as to whether there existed an employer-employee relationship for Title VII purposes,⁹⁵ and therefore the case will proceed on the merits. An amicus curiae brief filed by The Catholic League for Religious and Civil Rights in support of plaintiff's claim makes extensive use of statistical data compiled in private studies on both

⁸⁹ In addition to Title VII, there is a growing number of national origin discrimination cases being brought against public school systems under Title VI by the racial and Hispanic minorities to obtain bilingual-bicultural programs. The plaintiffs in these cases, for the most part, have been successful. See *Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Mun. Schools*, 499 F.2d 1147 (10th Cir. 1974); *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

⁹⁰ See *Hofer v. Campbell*, 17 FEP Cas. 1096 (D.C. Cir. 1978) (Hungarian); *Geronymo v. Joseph Horne Co.*, 440 F.Supp. 1157 (W.D. Pa. 1977) (Greek).

⁹¹ See *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (*per curiam*) (Italian); *Bozicevich v. American Airlines*, 17 FEP Cas. 247 (S.D.N.Y. 1977) (Italian); *Sek v. Bethlehem Steel Corp.*, 421 F. Supp. 983 (E.D. Pa. 1976), *aff'd mem.*, 565 F.2d 153 (3d Cir. 1977) (Polish); *Kutska v. California State College Dep't of Educ.*, 410 F. Supp. 48 (W.D. Pa. 1976), *aff'd mem.*, 549 F.2d 795 (3d Cir. 1977) (Slavic); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973) (Hungarian); *Spero v. American Home Prods. Corp.*, 13 FEP Cas. 1737 (N.D. Ill. 1973) (Italian).

⁹² 568 F.2d 87 (8th Cir. 1977) (*per curiam*).

⁹³ *Id.* at 88.

⁹⁴ *Id.* In *Bozicevich v. American Airlines*, 17 FEP Cas. 247 (S.D.N.Y. 1977), the court similarly found that the defendant-employer's employment practices indicated an absence of discrimination. See also cases cited in note 91 *supra*.

⁹⁵ *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977).

past and present discrimination against Catholics, Jews, Italians, and Poles.

C. The Equal Protection Clause and National Origin Discrimination

No cases involving claims of national origin discrimination brought by an American of southern and eastern European ancestry have reached the Supreme Court. The question whether classifications on the basis of these ethnic groups are inherently suspect under the Equal Protection clause of the fourteenth amendment therefore has never been directly addressed by the Court. In the case of *Regents of the University of California v. Bakke*,⁹⁶ however, Justice Powell, who announced the opinion of the Court, discussed the notion of cultural pluralism in terms that were broad enough to apply to all ethnic groups:

During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a ‘majority’ composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.⁹⁷

This recent pronouncement of the Court suggests that a claim of national origin discrimination brought by a white ethnic under the Equal Protection clause might receive “strict scrutiny.” Unfortunately, in order for an individual pressing a claim under the fourteenth amendment to prevail, he or she must prove that state action was involved in the discrimination and that there existed discriminatory animus.⁹⁸

D. Reverse Discrimination Cases

The existence of reverse discrimination, which is related to national origin discrimination, may be traced to at least three sources. The first source is an Executive Order promulgated in 1965 that requires an employer performing a government contract to take “affirmative action” to ensure that applicants are employed, and employees treated, without regard to their race, creed, color or national origin.⁹⁹ “Affirmative action” has been interpreted by the Department of Labor to require that employers set “goals and timetables” that favor certain minorities (other than white

⁹⁶ 438 U.S. 265 (1978).

⁹⁷ *Id.* at 292.

⁹⁸ Two commentators have suggested that in cases arising under the fourteenth amendment, courts attach greater importance to the weight of the evidence than to evidence of purposeful intent. See Neuberger & Grady, *Evidence and Intent in a Fourteenth Amendment Employment Discrimination Case*, 29 LAB. L.J. 72, 76 (1978).

⁹⁹ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

ethnics) in hiring and promotion practices. Reverse discrimination also may be traced to the "goals and timetables" for employers and universities to ensure affirmative action established by administrative agencies such as the EEOC and the Department of Health, Education and Welfare.¹⁰⁰ These goals and timetables essentially consist of numerical quotas. For example, an employer may be required to hire or promote one "minority" person for every "non-minority" person hired or promoted. White ethnics obtain no relief from goals and timetables, because they are classified as "non-minorities." This classification scheme appears to be anomalous, since the EEOC has acknowledged the need for "affirmative action" on behalf of persons of southern and eastern European ancestry discriminated against because of religion or national origin.¹⁰¹ A third source of reverse discrimination is judicial interpretation of the case of *Griggs v. Duke Power Co.*,¹⁰² wherein the Supreme Court held that proof of discriminatory "impact" is sufficient to establish discrimination under Title VII. Courts allow the EEOC to use employee statistics to establish "disparate impact" on racial minorities,¹⁰³ and employers have had little success rebutting these statistics.¹⁰⁴ Since white ethnics are excluded from the "minority" classification, no statistics are gathered on employment practices relating to them, and they are denied evidence of "disparate impact" that is essential to prove discrimination. In effect, therefore, white ethnics are denied the protection of the Civil Rights Act of 1964 due to governmental policies creating preferential quotas that exclude them. Moreover, they are often made to pay the costs of these governmental policies, because, as one commentator suggests, "any quota agreement will necessarily affect the rights of others not [parties] to the agreement"¹⁰⁵

The governmental policy toward white ethnics has often caused these "non-minorities" to sue on the basis of reverse discrimination. In these reverse discrimination cases, courts have held that whites are protected under both section 1981 and Title VII from racial discrimination.¹⁰⁶ In addition, there have been several cases in which municipal affirmative action programs utilizing employment quotas successfully have been challenged on the ground that "voluntary" remedial racial quotas violate both

¹⁰⁰ For a list of the groups upon which records are compiled, see 43 Fed. Reg. 38,297 (1978).

¹⁰¹ 41 C.F.R. § 60-5.2 (1978). It appears that the mere threat that the EEOC will take legal action for noncompliance with its "goals and guidelines" has caused many employers to institute "voluntary" quotas themselves. See Pati & Reilly, *Reversing Discrimination: A Perspective*, 29 LAB. L.J. 9, 20 (1978).

¹⁰² 401 U.S. 424 (1971).

¹⁰³ See Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 29-30 & n.142 (1977).

¹⁰⁴ See Hay, *Making Statistics Work for the Employer in Employment Discrimination Cases*, 3 EMPLOYEE REL. L.J. 374 (1978).

¹⁰⁵ Comment, *Reverse Discrimination Developments Under Title VII*, 15 Hous. L. REV. 136, 148 (1977).

¹⁰⁶ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279-80 (1976); *Spiess v. C. Itoh & Co.*, 408 F. Supp. 916, 931-32 (S.D. Tex. 1976).

Title VII and the Equal Protection clause.¹⁰⁷ These cases may be of uncertain precedential value, however, in the wake of the Supreme Court's decision in *United Steelworkers of America v. Weber*.¹⁰⁸

In *Weber*, a white employee sued his employer and union, challenging the legality of a voluntary affirmative action plan that mandated a one-for-one quota for minority workers admitted to an on-the-job training program. Finding that this quota violated Title VII, the Court of Appeals for the Fifth Circuit held that, absent evidence of prior discrimination, an Executive Order impliedly mandating a racial quota must fall.¹⁰⁹ In a 5-2 decision, the Supreme Court reversed and found the racial quota valid under section 703(j) of Title VII¹¹⁰ based on the legislative history and historical context out of which the Civil Rights Act of 1964 arose. Justice Brennan, writing for the majority, stated that the primary concern of Congress in enacting Title VII was to prohibit racial discrimination in employment against blacks:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.¹¹¹

Looking to the language of section 703(j), which expressly does not "require any employer . . . to grant preferential treatment to any individual or group" based on its status as a minority,¹¹² the Court determined that although the section does not literally require employers to provide preferential treatment to blacks, inferentially it does not prohibit such quotas either.¹¹³ The Court stressed the "voluntariness" of the quota, yet it dis-

¹⁰⁷ See *Hiatt v. City of Berkeley*, 10 FEP Cas. 251 (Cal. Super. Ct. 1975); *Lige v. Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976); *Chimill v. City of Pittsburgh*, 15 FEP Cas. 447 (Commw. Ct. Pa. 1977).

¹⁰⁸ 47 U.S.L.W. 4851 (June 27, 1979), *rev'd* 563 F.2d 216 (5th Cir. 1977).

¹⁰⁹ 563 F.2d at 227.

¹¹⁰ 47 U.S.L.W. at 4853.

¹¹¹ *Id.* at 4854.

¹¹² Section 703(j) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j) (1976), provides, in pertinent part:

Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group

¹¹³ 47 U.S.L.W. at 4854. Chief Justice Burger and Justice Rehnquist dissented from the majority's ruling. In his dissent, Burger contended that sections 703(a) and (d), which prohibit discrimination by employers based on "race, color, religion, sex, or national origin," did violence to the interpretation given section 703(j) by the majority. The Chief Justice stated that "it is specious to suggest that § 703(j) contains a negative pregnant that permits employers to do what §§ 703(a) and (d) unambiguously *forbid* employers from doing." 47 U.S.L.W. at 4857-58 (Burger, J., dissenting) (emphasis in original). Burger concluded his dissent by cautioning the majority to

beware the "good result," achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men

missed, without consideration, an admission by the employer that it had adopted the plan under pressure from the federal agency charged with enforcing the Executive Order.¹¹⁴

The *Weber* decision is a troubling one. Nowhere in the majority opinion is there any mention of the fact that Congress intended to protect the rights of ethnic groups other than blacks when it enacted Title VII. Indeed, the Court appears not to have been sensitive to the effect of racial quotas on white ethnics. The Court merely concluded that the challenged quota did not "unnecessarily trammel the interests of the white employees."¹¹⁵ There seems little doubt that the *Weber* decision diminishes the chances of successful reverse discrimination claims under the 1964 Civil Rights Act.

Despite the pessimistic overtones of the *Weber* ruling, white ethnics suffering from reverse discrimination may not be foreclosed from obtaining relief. In *Regents of the University of California v. Bakke*,¹¹⁶ decided one year prior to *Weber*, the Supreme Court held invalid a racial quota built into a medical school's admissions policy. Although no majority consensus was reached, Justice Powell, who announced the judgment of the Court, concluded that the University's special admissions program, which was unavailable to whites, was unnecessary to the achievement of a diverse student body.¹¹⁷

From the foregoing, it is clear that white ethnic Americans have experienced little success in lawsuits alleging national origin discrimination. Although the language of modern civil rights laws is broad enough to extend protection to white ethnics, members of these groups still are not accorded minority status by either the governmental agencies charged with carrying the laws out or the courts in which relief is sought. There have been situations in which white ethnics have procured relief from their employers on the theory of reverse discrimination, but the continued via-

for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at "good ends."

Id. at 4858 (Burger, J., dissenting). For an example of a case in which a male employee successfully contended that a program favoring female employees for purposes of promotion was discriminatory, see *McAleer v. American Tel. & Tel. Co.*, 416 F. Supp. 435 (D.D.C. 1976). See also Goodman, *Equal Employment Opportunity: Preferential Quotas and Unrepresented Third Parties*, 44 GEO. WASH. L. REV. 483 (1976).

¹¹⁴ 47 U.S.L.W. at 4859 & n.2 (Rehnquist, J., dissenting).

¹¹⁵ 47 U.S.L.W. at 4855.

¹¹⁶ 438 U.S. 265 (1978).

¹¹⁷ *Id.* at 320. In a case decided since the *Bakke* ruling, an Italian American who was denied admission to law school challenged the constitutionality of the school's Special Academic Assistance Program. See *DiLeo v. Board of Regents of the Univ. of Colo.*, 590 P.2d 486 (Colo. 1978) (en banc), cert. denied, 441 U.S. 927 (1979). Notwithstanding DiLeo's demonstration that he came from a disadvantaged background, the Colorado Supreme Court upheld the program, which provided preferential treatment only to Blacks, Mexican Americans, and Puerto Ricans. In reaching this decision, the court noted that even if it struck down the program, DiLeo would be left without a remedy since he could not qualify for admission under the regular admission process. 590 P.2d at 489.

bility of this approach has been cast in doubt by the Supreme Court's recent *Weber* ruling.

CONCLUSION

As recently as about fifty years ago, immigrants from southern and eastern Europe were labelled "inferior" and "unassimilable" by the Anglo-American establishment. Although members of these groups soon proved themselves to be productive and hard working, the stigma of inferiority remained codified in our immigration laws until 1968. White ethnics still are not protected from other forms of discrimination, because governmental agencies and courts are selective in their interpretation of civil rights legislation. Apparently, it is assumed that these groups have been absorbed fully into the "white majority." It is submitted that a consequence of this assumption has been to deny white ethnics the equal protection of the laws, and therefore the government's indifference toward persons of southern and eastern European ancestry is in need of reform.

Several steps may be taken to protect white ethnic groups from national origin discrimination. First, governmental agencies should begin to collect data on ethnic origin.¹¹⁸ Group statistics play a significant role in establishing discrimination, and they may help sensitize people to the dramatic differences that exist between the various ethnic groups in the United States. Second, individuals seeking relief in the courts from national origin discrimination should make use of sociological and historical evidence to support their claims.¹¹⁹ Indeed, plaintiffs should argue that the Anglo-conformist and melting pot theories are inherently discriminatory since they require assimilation into a majority culture and, inferentially, place a badge of inferiority on minority cultures. Finally, white ethnics should resort to political and educational forums to foster an understanding of the concept of cultural pluralism.

¹¹⁸ As a result of pressure from oriental ethnic groups, the 1980 census will include data on ethnicity of all persons, not merely of the first two generations.

¹¹⁹ Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L.L. REV. 169 (1978).